No. 49807-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

LARRY DWAYNE BLACKWELL,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 04-1-03816-4
The Honorable James Orlando, Judge

OPENING BRIEF OF APPELLANT

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1. The trial court erred when it denied Larry Blackwell's CrR 7.8 motion to vacate his 2005 guilty plea because the Judgment and Sentence is invalid on its face.

II. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Is Larry Blackwell's 2005 Judgment and Sentence invalid on its face, making his CrR 7.8 motion to vacate not time barred?

2. Is the crime of escape an alternative means crime where the statute lists two separate and distinct ways of committing the crime, both of which have their own definition in a separate section of the statute?

3. Is Larry Blackwell's 2005 escape conviction invalid on its face where he was charged with escape under the "escape from a detention facility" alternative means of committing that offense, but his plea statement only supports a factual basis for the "escape from custody" alternative means?

4. Was Larry Blackwell's 2005 plea voluntary, intelligent and knowing where there is nothing in the record to show he understood the elements of the charged offense in relation to

the facts or that his admitted conduct was insufficient to satisfy the elements of the charged offense?

III. STATEMENT OF THE CASE

Larry Dwayne Blackwell pleaded guilty on June 3, 2004 to one count of attempting to elude a pursuing police vehicle. Blackwell was sentenced to serve 60 days in jail, with the balance remaining on his sentence to be converted to "work crew." (CP 2) He was provided with and acknowledged the work crew rules and schedule. (CP 2) Blackwell "failed to comply with his work crew schedule." (CP 2) So on August 5, 2004, the State charged Blackwell with one count of escape in the first degree (RCW 9A.76.110(1)). (CP 1) The State alleged that on or about June 18, 2004, Blackwell "did unlawfully and feloniously, while being detained pursuant to a felony conviction, or an equivalent juvenile offense, knowingly escape from a detention facility[.]" (CP 1)

Blackwell pleaded guilty on May 11, 2005. (CP 3-6; 05/11/05 RP 2-5) To explain why he was guilty of the charge, Blackwell writes:

> On June 18, 2004, in Pierce County WA I was serving a jail sentence for Eluding a Police Vehicle. My jail time was converted to work crew. After initially reporting twice, I stopped attending work crew.

(CP 6) The trial court found a factual basis for the plea, and found that Blackwell's plea was knowing and voluntary. (05/11/05 RP 5) The trial court sentenced Blackwell to a 17 month standard range sentence. (CP 14; 05/11/05 RP 6)

On September 23, 2016, Blackwell filed a pro se CrR 7.8 motion, asking the court to vacate his plea because it lacked a sufficient legal and factual basis. (CP 23-32) Blackwell argued that he pleaded to and was convicted of an uncharged alternative means of committing escape, because knowingly escaping from a "detention facility" is different from knowingly escaping from "custody." (CP 25-27) Blackwell also pointed out that his Judgment and Sentence indicates that he was convicted of violating RCW 9A.76.100 (compounding)[1] rather than RCW 9A.76.110 (escape). (CP 11, 24)

The State acknowledged the scrivener's error, and the court entered an order correcting the Judgment and Sentence. (CP 35-37, 59-60) But the court did not address Blackwell's

[1] A person commits the crime of "compounding" if that person: "requests, accepts, or agrees to accept any pecuniary benefit pursuant to an agreement or understanding that he or she will refrain from initiating a prosecution for a crime;" or "confers, or offers or agrees to confer, any pecuniary benefit upon another pursuant to an agreement or understanding that such other person will refrain from initiating a prosecution for a crime." RCW 9A.76.100(1).

motion to vacate his plea. (CP 59-60) Blackwell filed a motion to reconsider, which the trial court denied. (CP 67-72, 75) Blackwell now appeals. (CP 76-77)

IV. ARGUMENT & AUTHORITIES

A. BLACKWELL'S CRR 7.8 MOTION IS NOT TIME BARRED

Blackwell pleaded guilty and was sentenced in May of 2005, and filed a CrR 7.8 motion to vacate his plea in September of 2016. CrR 7.8 allows the trial court to "relieve a party from a final judgment, order, or proceeding" for several reasons, including when a "a judgment is void" or "[a]ny other reason justifying relief from the operation of the judgment." CrR 7.8(b)(4)(5).

CrR 7.8 motions are also subject to RCW 10.73.090(1), which provides:

> No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

A judgment and sentence is invalid on its face if it evidences an infirmity without further elaboration. *In re Pers. Restr. of Stoudmire,* 141 Wn.2d 342, 353, 5 P.3d 1240 (2000); *In re Pers. Restr. of Thompson,* 141 Wn.2d 712, 718, 10 P.3d 380 (2000).

"[D]ocuments signed as part of a plea agreement may be considered in determining facial invalidity when those documents are relevant in assessing the validity of the judgment and sentence." *In re Pers. Restr. of Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002).

For example, in *Thompson*, the Court reviewed the plea documents, which included the Information, and saw that the date of the offense as listed in the documents showed that the offense occurred nearly two years before Thompson's acts became a crime. 141 Wn.2d at 716. Based on this, the Court found that Thompson's conviction was invalid on its face. 141 Wn.2d at 719. And in *Stoudmire*, the Judgment and Sentence listed the charges and the dates of the crimes, while the charging document filed as part of the plea agreement set forth the date the charges were filed. 141 Wn.2d at 354. Together, these documents demonstrated that Stoudmire was charged beyond the time allowed by the statute of limitations, and thus the conviction was invalid on its face. 141 Wn.2d at 354.

It is therefore proper in this case to review not only the Judgement and Sentence, but also the Information and Statement of Defendant on Plea of Guilty to determine whether Blackwell's

plea is facially invalid. A review of those documents will show that it is.

B. ESCAPE IS AN ALTERNATIVE MEANS CRIME

Blackwell was charged with escape pursuant to RCW 9A.76.110(1), which provides, "A person is guilty of escape in the first degree if he or she knowingly escapes from custody or a detention facility while being detained pursuant to a conviction of a felony or an equivalent juvenile offense." (Emphasis added.) "Custody" is defined as "restraint pursuant to a lawful arrest or an order of a court, or any period of service on a work crew[.]" RCW 9A.76.010(2). "Detention facility" is defined as "any place used for the confinement of a person[.]" RCW 9A.76.010(3).

Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. See *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed. *See State v. Arndt,* 87 Wn.2d 374, 384, 553 P.2d 1328 (1976).

Whether a statute provides an alternative means for committing a crime is left to judicial determination. *State v.*

Sandholm, 184 Wn.2d 726, 732, 364 P.3d 87 (2015). In making this determination, the use of the disjunctive conjunction "or" in a list of methods of committing the crime does not necessarily end the inquiry. *State v. Owens*, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014). Rather, the alternative means analysis should focus on whether the statute describes the crime in terms of distinct acts, or closely related acts that are aspects of one type of conduct. *Sandholm*, 184 Wn.2d at 734. The more varied the criminal conduct, the more likely the statute describes alternative means. *Sandholm*, 184 Wn.2d at 734.

RCW 9A.76.110 uses the disjunctive "or" to separately list two types of escape: escape from custody or escape from a detention facility. Custody and detention facility are both separately defined in RCW 9A.76.010. And a person would have to engage in very different and distinct acts in order to commit each type of escape. One requires the actor to be in the community but purposefully fail to appear at a place or location he or she is required by court order to be. The second requires the actor to be confined in a facility and to purposefully leave the facility without permission. RCW 9A.76.110 is clearly an alternative means statute.

C. THE JUDGMENT AND SENTENCE IS INVALID ON ITS FACE

The Judgment and Sentence is invalid on its face because it shows that Blackwell pleaded guilty to an uncharged alternative means of committing escape. Due process requires an affirmative showing that a defendant entered a guilty plea knowingly, intelligently, and voluntarily. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; *Boykin v. Alabama*, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A plea cannot be voluntary "unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). "[A]n accused must not only be informed of the requisite elements of the crime charged, but also must understand that his conduct satisfies those elements." *In re Pers. Restr. of Hews*, 99 Wn.2d 80, 87-88, 660 P.2d 263 (1983). The State bears the burden of proving the validity of the guilty plea from the record or by "clear and convincing extrinsic evidence." *Ross*, 129 Wn.2d at 287.

CrR 4.2 requires that the court not accept a guilty plea without first determining that the defendant is making it voluntarily, competently, and with an understanding of the nature of the charge

and the consequences of the plea. *Ross*, 129 Wn.2d at 284. Additionally, under CrR 4.2(d), "[t]he court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." Before accepting a plea the judge must determine that the defendant's admitted conduct constitutes the charged offense. *In re Pers. Restr. Of Crabtree*, 141 Wn.2d 577, 585, 9 P.3d 814 (2000).

The requirement in CrR 4.2(d), that there be a factual basis for the plea, is procedural and not constitutionally mandated. *In re Pers. Restr. of Hews*, 108 Wn.2d 579, 592 n. 2, 741 P.2d 983 (1987); *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). The purpose behind the factual basis requirement, however, is to protect a defendant who may enter a plea with an understanding of the nature of the charge, but without realizing that his conduct does not actually fall within the charge. FERGUSON, 13 WASHINGTON PRACTICE, § 3613 (2d ed. 1997); *In re Pers. Restr. Of Keene*, 95 Wn.2d 203, 209, 622 P.2d 360 (1980). The factual basis of a plea is constitutionally significant where it relates to the defendant's understanding of his plea. *Hews*, 108 Wn.2d at 591-92. The failure to establish an adequate factual basis leaves the plea open to the challenge that it was involuntary. *Hews*, 108

Wn.2d at 592; *State v. Rigsby*, 49 Wn. App. 912, 916, 747 P.2d 472 (1987).

Under RCW 9A.76.110(1), a person can commit the offense of escape by two alternative means: (1) by knowingly escaping from custody; or (2) by knowingly escaping from a detention facility. The information alleged that Blackwell escaped from a detention facility. (CP 1)

In his plea statement Blackwell only admitted he failed to return to work crew, which is the alternative means of escaping from custody. (CP 6) But Blackwell was not charged with that alternative. Blackwell's admitted conduct, which was the sole basis for the court's factual basis finding, does not establish the elements of the charged offense. Thus, there was no factual basis for the plea to the charged offense.

Additionally, the court erred in finding the plea was knowing and voluntary because it failed to determine whether Blackwell understood the nature of the charge in relation to the facts. A plea is only valid where the defendant has knowledge of the elements of the charged offense and how the facts relate to the charge. Hews, 99 Wn.2d at 87-88. There is nothing in the record that shows Blackwell understood the critical elements of the charged offense

and that his conduct satisfied the elements of that charge. What the record does show is that Blackwell's admitted conduct may have satisfied the escape from custody means of committing escape, but he was not charged with that means. Moreover, at no time during the plea colloquy does the court explain to Blackwell that escape from a detention facility, and not his admitted conduct, is a critical element of the charge. (05/11/05 RP 3-6)

In sum, the face of the plea documents and Judgment and Sentence show that Blackwell's admitted conduct did not satisfy the essential elements of the offense as charged and that he was pleading guilty to an uncharged offense. Furthermore, these documents show that Blackwell's plea was not voluntary, knowing and intelligent and that the court failed to comply with CrR 4.2. Blackwell's plea is therefore invalid on its face.

A defendant is entitled to withdraw a guilty plea when necessary to correct a manifest injustice. CrR 4.2(f); *State v. Marshall*, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001); *State v. Davis*, 125 Wn. App. 59, 68, 104 P.3d 11 (2004). A manifest injustice exists if the plea was involuntary. *Marshall*, 144 Wn.2d at 281. A manifest injustice is "an injustice that is obvious, directly observable, overt, not obscure." *State v. Saas*, 118 Wn.2d 37, 42,

820 P.2d 505 (1991) (quoting *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). An involuntary plea constitutes a manifest injustice. *Saas*, 118 Wn.2d at 42. Therefore, Blackwell's plea should be vacated and the case remanded so that he can withdraw his plea. *Saas*, 118 Wn.2d at 42; *Wood v. Morris*, 87 Wn.2d 501, 511, 554 P.2d 1032 (1976).

V. CONCLUSION

Escape is an alternative means crime. The State alleged in the Information that Blackwell committed the crime by one means, but Blackwell pleaded guilty and provided a factual basis for the other uncharged alternative means. Blackwell's judgment is therefore invalid on its face, and this Court should vacate Blackwell's guilty plea and remand his case to the trial court for further proceedings.

DATED: July 31, 2017

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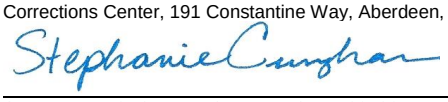
Attorney for Appellant Larry D. Blackwell

CERTIFICATE OF MAILING

I certify that on 07/31/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Larry Blackwell, DOC# 850259, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



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